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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT CAUDLE and
RONALD WRIGHT,

Petitioners,

versus

v.

SEARS, ROEBUCK & CO. and
AMERICAN ARBITRATION ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

The sole question presented for review on this petition for writ of certiorari to the Supreme Court of Illinois is whether, prior to an arbitration hearing or award, Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, prohibits a state court from addressing the merits of a complaint which alleges overt pre-arbitration hearing misconduct committed with malice and in bad faith by an arbitration institution and one of the parties to an arbitration, specifically a pre-arbitration hearing conspiracy between an arbitration institution and one of the parties intended to deprive the other party of a fair, neutral, and objective forum by devising a scheme calculated to make it financially impossible for the other party to participate in the arbitration.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Robert Caudle (Plaintiff-Appellee-Cross-Appellant)
2. Ronald Wright (Plaintiff-Appellee-Cross-Appellant)
3. Sears, Roebuck & Co. (Defendant-Appellant-Cross-Appellee)
4. American Arbitration Association (Defendant-Appellant-Cross-Appellee)

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Robert Caudle and Ronald Wright, by counsel, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this proceeding on October 2, 1996.

OPINIONS BELOW

The Order of the Supreme Court of Illinois, entered on October 2, 1996, is reproduced as Appendix "A" hereto.

The Order of the Appellate Court of Illinois, Fifth District, entered on July 26, 1996, is reproduced as Appendix "B" hereto.

The Order of the Circuit Court of Wayne County, Illinois, entered on December 6, 1994, is reproduced as Appendix "C" hereto.

JURISDICTION

The Order of the Supreme Court of Illinois in this proceeding was entered on October 2, 1996.

Upon timely application filed herein by counsel for petitioners, the Honorable John Paul Stevens, Associate Justice of this Court and Circuit Justice for the Seventh Circuit, issued an Order on December 23, 1996, extending the time for filing this petition for writ of certiorari to and including January 30, 1997.

The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois by writ of certiorari is invoked under 28 U.S.C. § 1257.

STATUTE INVOLVED

The statute involved in this case is Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, the full text of which is reproduced as Appendix "D" hereto.

STATEMENT OF THE CASE

The facts of this case are set forth in detail in the complaint filed by petitioners Robert Caudle and Ronald Wright ("Caudle and Wright") in the trial court below, a copy of which (excluding exhibits) is reproduced as Appendix "E" hereto.

For purposes of this petition for writ of certiorari, the following statement of the case is provided:

Prior to 1993, Caudle and Wright were two of approximately 2,600 catalog merchants owning and operating their own Sears catalog stores. Pursuant to a written contract with respondent Sears, Roebuck & Co. ("Sears"), which included an arbitration clause, Caudle and Wright took orders from customers and distributed Sears catalog merchandise to them. In 1993, Sears abruptly terminated its catalog distribution business, and all Sears catalog merchants, including Caudle and Wright, lost their businesses.

The termination of the catalog distribution business by Sears spawned litigation between Caudle, Wright, and other catalog merchants, on the one hand, and Sears on the other. Ultimately, the parties were ordered to arbitrate their disputes before respondent American Arbitration Association ("AAA") pursuant to the arbitration clause in the written contract.

However, prior to their arbitration hearings and therefore prior to any arbitration awards, Caudle and Wright became aware of overt pre-arbitration hearing misconduct on the parts of Sears and the AAA, specifically a pre-arbitration hearing conspiracy between Sears and the AAA intended to deprive Caudle and Wright of a fair, objective, and neutral forum by devising a scheme with malice and in bad faith calculated to make it financially impossible for Caudle and Wright to participate in the arbitration hearings.

Shortly after they became aware of this overt pre-arbitration hearing misconduct, Caudle and Wright filed a complaint in state court against Sears and the AAA which set forth in detail the specific allegations in support of this pre-arbitration hearing conspiracy. In their complaint, Caudle and Wright alleged:

> 7. By reason of [the] arbitration provision, Defendant Sears demands that each Plaintiff is required to submit his claims to arbitration pursuant to the rules of Defendant [American Arbitration Association ("AAA")].
>
> . . . .
>
> 9. By accepting each Plaintiff's demand for arbitration, Defendant AAA expressly and impliedly promised each Plaintiff that it would provide a fair, neutral and objective forum in which the arbitration process would be conducted in accordance with certain procedural rules, a copy of relevant portions of which are attached hereto, made a part hereof and labeled as Exhibit "B."
>
> 10. Based on information and belief, Defendant Sears and its subsidiaries are members of Defendant AAA

and has obtained that status by making monetary payments to [Defendant] AAA.

11. Defendant Sears has a regular and ongoing business relationship with Defendant AAA in that, over the broad range of Sears' business activities, it regularly inserts arbitration clauses similar to Exhibit "A," all of which leads to a regular and substantial financial benefit to Defendant AAA.

12. Sears has specific knowledge that, by reason of its termination of the catalog stores, each Plaintiff has extremely limited financial resources.

13. Defendants Sears and AAA have conspired and acted in complicity with each other, directly and indirectly, to deprive each Plaintiff herein of a fair, neutral and objective forum within which to fairly litigate his claims in that:

A. Rule 17 of the AAA Rules provides that one (1) arbitrator shall be appointed, unless a different number is specified in the arbitration agreement. The arbitration clause of Exhibit "A" *does not* specify the number of arbitrators, nor has the AAA revealed a basis for appointment of more than one (1) arbitrator. Over objection, as indicated in Exhibit "C," which is substantially identical to letters sent on behalf of Plaintiffs in each arbitration, and in violation of Rule 17, and at Sears' insistence, as shown on Exhibit "D," Defendant AAA appointed three (3) arbitrators in each arbitration.

B. In each case, such appointments were made without explanation as to why three (3) arbitrators were appointed and why three (3) arbitrators were necessary or desirable under the provisions of Rule 17.

C. Defendant Sears, being fully aware of the financial hardship imposed upon Plaintiffs by its termination of the catalog stores, nevertheless insisted upon, and Defendant AAA allowed, three (3) arbitrators in order to increase the cost to Plaintiffs beyond that which they could reasonably pay.

D. Defendant AAA, in submission of names of proposed arbitrators between each Plaintiff and for those with claims identical to Plaintiffs, submitted names of individuals with previous professional associations with Sears or who refused to disclose whether they had any prior association with Defendant Sears. In each such instance, Plaintiffs, or others similarly situated, objected, or at a minimum, requested further information regarding said arbitrators. In each instance, the objected to and questioned arbitrators were appointed by Defendant AAA without reference to, ruling upon, or response to Plaintiffs' questions or objections.

E. On or about June 15, 1994, counsel for Defendant Sears communicated with an officer of Defendant AAA regarding all Plaintiffs' cases by letter, Exhibit "E," seeking to have Defendant AAA exert financial pressure on Plaintiffs regarding payment of arbitration and other fees. Thereafter, and, upon information and belief, with the collusion of Defendant Sears by its counsel and representatives of Defendant AAA, the following occurred:

i. Following correspondence from counsel for Defendant Sears, referred to above, and contrary to rules of the AAA, each Plaintiff has been threatened with dismissal of his claims *with preju-*

> *dice* unless such fees are paid by a date certain. Defendant Sears claims that the effect of any such dismissal with prejudice would be to deny Plaintiffs any forum within which to litigate their claims against Defendant Sears.
>
> ii. In each instance, both Defendant Sears and Defendant AAA are aware that each Plaintiff is under a severe financial hardship and lack resources to pay such amounts.

F. Rule 47 of the AAA Rules allows for deferral or reduction of AAA administrative fees in cases of extreme hardship. Rule 51 allows Defendant AAA to determine the amount and timing of deposits of funds for arbitrator compensation prior to commencement of arbitration. Plaintiffs Caudle and Isaacson [who is no longer a party to this proceeding] submitted documentation of their severe financial and/or physical disability regarding such fees and deposits, a copy of which is attached hereto and labeled as Exhibits "F" and "G." Further, Caudle objected to the billing amount as shown in Exhibit "H." Further, another former Sears merchant, Forrest VanRiper, in his arbitration, objected to the extreme inconsistency in the amount and method of calculating the deposit for arbitrators' fees; a copy of that objection is attached hereto as Exhibit "I." Defendant AAA never responded to the objections stated in Exhibits "H" and "I."

G. Defendants Sears and AAA acted in concert and in violation of the letter and spirit of Rule 50 of the AAA Rules in that each of them conspired to bring to the attention of the arbitrators

the financial circumstances of Plaintiffs as shown in part by Exhibit "J." Plaintiffs objected to Defendants' bringing such matters to the attention of the arbitrators, which objection was ignored. (See Exhibit "A").

H. The AAA Rules, on page 22 thereof, (see Exhibit "A"), do not permit dismissal with prejudice for non-payment of fees, but permit only "suspension or termination" with no authority granted to make dismissal with prejudice.

14. All of the above acts engaged in by Defendants Sears and AAA were and are part of a conspiracy between them, in violation of the express AAA Rules, to deny Plaintiffs a fair, objective and neutral forum governed by cognizable rules of procedure within which to resolve their various claims against Defendant Sears.

15. The actions of Defendants Sears and AAA as outlined herein are in bad faith, are willful, intentional and specifically designed and coordinated between them to violate Plaintiffs' rights to a fair forum within which to present their claims.

. . . .

WHEREFORE, Plaintiffs, and each of them, pray that this Court enter a declaratory judgment, based upon the arbitration misconduct alleged herein and the conspiracy of Defendants, that Defendants Sears and AAA have conspired to deny Plaintiffs a fair, objective and neutral forum within which to present their claims against Defendant Sears and [that] Plaintiffs are discharged from any obligation to arbitrate their claims against Defendant Sears, regardless of the outcome of any other pending litigation.

Appendix "E" at pp. A-10 to A-15.

The gravamen of Caudle and Wright's complaint against Sears and the AAA is a pre-arbitration hearing conspiracy between Sears and the AAA intended to deprive Caudle and Wright of a fair, neutral, and objective arbitration forum by devising a scheme with malice and in bad faith to make it financially impossible for Caudle and Wright to participate in their arbitrations. Specifically, this overt pre-arbitration hearing misconduct includes the following allegations:

> (1) An agreement between Sears and the AAA to the appointment of 3 arbitrators rather than 1 in order to artificially triple the costs to Caudle and Wright in violation of AAA rules;
>
> (2) An agreement between Sears and the AAA that the AAA would refuse to disclose to Caudle and Wright whether the arbitrators selected had any prior association with Sears;
>
> (3) An agreement between Sears and the AAA that the AAA would demand that all fees and costs associated with the arbitration be paid by Caudle and Wright in advance of the arbitration and an order by the AAA that the failure to do so would result in dismissal of Caudle and Wright's claims with prejudice, all in violation of AAA rules;
>
> (4) An agreement between Sears and the AAA that the AAA would refuse to defer administrative fees (in Caudle's case over $8,000) based on Caudle and Wright's showing of extreme financial hardship, as permitted by the AAA rules; and
>
> (5) The decision of Sears, acquiesced in by the AAA, to bring the financial circumstances of Caudle and Wright before the arbitrators in violation of AAA rules.

Pursuant to Rule 14(g)(i) of this Court, Caudle and Wright provide the following summary of the record below to demonstrate that the federal question presented for review in this proceeding was

timely and properly raised and that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois on a writ of certiorari:

On October 26, 1994, prior to any arbitration hearing or award, Caudle and Wright filed their complaint against Sears and the AAA seeking (1) a declaratory judgment that Sears and the AAA had conspired to deprive them of a fair, neutral, and objective arbitration forum and that Caudle and Wright be discharged from any obligation to arbitrate their claims against Sears; and (2) a judgment against Sears and the AAA for compensatory and punitive damages. Appendix "E" at pp. A-10 to A-18.

On December 6, 1994, following a hearing on Sears' and the AAA's motions to dismiss Caudle and Wright's complaint, the trial court dismissed Caudle and Wright's complaint with prejudice. The trial court found, *inter alia*, that Caudle and Wright's "allegations of wrongdoing, occurring during the arbitration process, ... fall squarely within the scope of section 10 of the FAA" and that "[t]he Federal Arbitration Act (FAA) provides the exclusive remedy for challenging acts that taint an arbitration award." Appendix "C" at pp. A-6 to A-8.

On July 26, 1996, following Caudle and Wright's appeal from the trial court's order dismissing their complaint with prejudice, the Appellate Court of Illinois, Fifth District, affirmed the trial court's order. The Appellate Court of Illinois affirmed, *inter alia*, the trial court order dismissing Caudle and Wright's complaint with prejudice on the ground that "Section 10 of the Federal Arbitration Act" provides "the exclusive remedy for challenging acts that taint an arbitration award." Appendix "B" at pp. A-2 to A-5. (Caudle and Wright's notice of appeal to the Appellate Court of Illinois, filed June 20, 1995, is reproduced as Appendix "F" hereto.)

On October 2, 1996, following Caudle and Wright's appeal of the Appellate Court order affirming the trial court order dismissing Caudle and Wright's complaint with prejudice, the Supreme Court of Illinois denied Caudle and Wright's petition for leave to appeal from the Appellate Court of Illinois to the Supreme Court of

Illinois without opinion. Appendix "A" at pp. A-1. (Caudle and Wright's petition for leave to appeal from the Appellate Court of Illinois to the Supreme Court of Illinois, filed August 16, 1996, is reproduced as Appendix "G" hereto.)

ARGUMENT

SECTION 10 OF THE FEDERAL ARBITRATION ACT DOES NOT PROHIBIT A STATE COURT FROM ADDRESSING THE MERITS OF A COMPLAINT, FILED PRIOR TO AN ARBITRATION HEARING OR AWARD, WHICH ALLEGES OVERT PRE-ARBITRATION HEARING MISCONDUCT COMMITTED WITH MALICE AND IN BAD FAITH BY AN ARBITRATION INSTITUTION AND ONE OF THE PARTIES TO AN ARBITRATION.

Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, reproduced below at Appendix "D," only concerns the vacation of arbitration awards rendered after arbitration hearings. By its express language, Section 10 of the FAA does not apply until an arbitration award has been rendered. *See* Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 28.3.3.1, at 28:47 (1995). In this proceeding, an arbitration award has not been rendered; therefore, Section 10 of the FAA does not even apply. Contrary to the orders of the state courts below, Section 10 of the FAA does not prohibit the trial court in this proceeding from addressing the merits of Caudle and Wright's complaint against Sears and the AAA.

Even if Section 10 of the FAA were applicable to this proceeding, it is clear that Congress did not intend to prohibit parties to an arbitration from seeking relief from a court prior to an arbitration award if a complaint alleges overt pre-arbitration hearing misconduct. As this Court has held when interpreting Section 10 of the FAA in a case involving arbitration misconduct:

> [I]t was not the purpose of Congress to authorize litigants to submit their cases and controversies to arbi-

> tration boards that might reasonably be thought biased against one litigant and favorable to another.

Commonwealth Coating Corp. v. Continental Casualty Co., 393 U.S. 145, 80 S. Ct. 337, 341, 21 L. Ed. 2d 301 (1968).[1] If the state court judgment below is not reversed by this Court, that is precisely what will occur in this case.

There are no controlling precedents, federal or state, involving the precise issue presented in this proceeding, *i.e.*, whether Section 10 of the FAA prohibits a state court from addressing the merits of a complaint, filed prior to any arbitration hearing or award, which alleges a pre-arbitration hearing conspiracy between an arbitration institution and one of the parties intended to deprive the other party of a fair, neutral and objective forum by devising a scheme calculated to make it financially impossible for the other party to participate in the arbitration. However, there are precedents, both federal and state, involving closely analogous fact situations holding that an aggrieved party to an arbitration is not prohibited from litigating in court the merits of a complaint alleging overt pre-arbitration misconduct prior to an arbitration hearing or award. The issue presented for review in this proceeding, therefore, is ripe for review by this Court.

In the leading federal case of *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.* ("*Metropolitan*"), 780 F. Supp. 885 (D. Conn. 1991), a federal district court was faced with an attempt by a plaintiff to disqualify an arbitrator alleged to have committed overt misconduct prior to the commencement of an arbitration hearing and the issuance of an

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[1] Petitioners are well aware of this Court's pro-arbitration interpretation of the FAA. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, — U.S. —, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *Mastrobuono v. Shearson/Lehman Hutton, Inc.*, — U.S. —, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *First Options of Chicago, Inc. v. Kaplan*, — U.S. —, 115 S. Ct. 1920, 131 L. E. 2d 985 (1995). However, petitioners respectfully submit that the overt pre-arbitration hearing misconduct alleged in this proceeding has never been addressed by this Court when interpreting Section 10 of the FAA. *See generally* Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 14.1, at 14.2 *et seq.* (1995); Gabriel M. Wilner, *Domke on Commercial Arbitration* §§ 22.02 & 22.03 (rev. ed. 1996).

award. The defendant argued that the plaintiff's only remedy was to seek to vacate the award after it was rendered. According to the *Metropolitan* court, the "reality" is that the plaintiff "will litigate the priority of [the arbitrator's] conduct *after* the arbitration even if it is precluded from disqualifying him *prior to* the process," *id.* at 894 (emphasis in original):

> In light of this reality, it simply does not follow that the policy objective of an expeditious and just arbitration with minimal judicial interference is furthered by categorically prohibiting a court from disqualifying an arbitrator prior to arbitration. . . . Here, the parties will not only suffer the delay produced by litigation seeking to vacate the award after arbitration, but risk the additional loss of time and money if the court finds in [the plaintiff's] favor. Should [the defendant] prevail on the merits of its claim and the court follow [the defendant's] approach of granting relief only *after* arbitration concludes, [the plaintiff] would be entitled to vacate the award and the parties will then have to go through the entire arbitration process all over again before a different arbitration panel [citing Section 10 of the FAA] . . . .
>
> Under these circumstances, it seems senseless to require both parties to "submit to a prolonged, costly proceeding . . . [when] this unfair burden can readily be avoided upon proof in this action of bias and collusion" [citation omitted]. The "just" and "expeditious" policy, therefore, would be to evaluate [the plaintiff's] claims on the merits of its action for injunctive relief *prior* to arbitration rather than have the parties waste their time, energy and money by participating in a potentially tainted process.

Id. at 894 (emphasis in original). In this case, it is equally "senseless" to require the parties to wait until an arbitration award has been rendered at some point in the distant future before allowing Caudle and Wright to challenge the pre-arbitration hearing conspiracy alleged in their complaint between Sears and the AAA.

Similarly, in the leading state case of *Astoria Medical Group v. Health Insurance Plan of Greater New York* ("*Astoria Medical Group*"), 227 N.Y.S.2d 128, 182 N.E.2d 85 (N.Y. Ct. App. 1962), the Court of Appeals of New York addressed a fact situation involving overt pre-arbitration hearing misconduct prior to the rendition of an arbitration award, presaging the holding of the *Metropolitan* court. The *Metropolitan* court articulated the importance of the *Astoria Medical Group* case as follows:

> In *Astoria Medical Group*, a case involving a dispute over the impartiality of a party-appointed arbitrator to a tripartite arbitration panel, the New York Court of Appeals, a jurisdiction well versed on the subtleties and complexities of arbitration law, stated: "We are persuaded that, in an appropriate case, the courts have inherent power to disqualify an arbitrator *before* an award has been rendered" [citation omitted]. Significantly, the Second Circuit has noted "that the [Federal Arbitration Act] is modelled substantially" on New York's arbitration law. [*See Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984)].
>
> . . . .
>
> In his dissent in *Astoria Medical Group*, Chief Judge Desmond provides additional support for the view that a court has the equitable power to disqualify a party-appointed arbitrator *prior* to the beginning of the arbitration. . . . The dissent noted that ruling on the qualifications of an arbitrator *prior* to arbitration "is the time to pass on such a clause of illegibility since if the party knowing the disqualifying facts as to his opponent's nominee nevertheless participates in an arbitration without applying for the nominee's removal his inaction will constitute a waiver."

Metropolitan, 780 F. Supp. at 895 & n. 5, *quoting Astoria Medical Group*, 182 N.E.2d at 86 & 91 (emphasis added). *See also* Gabriel M. Wilner, *Domke on Commercial Arbitration* §§ 22.02 & 22.03 (rev. ed. 1996).

Also, the Supreme Court of Connecticut, in *Gaer Brothers, Inc. v. Mott*, 144 Conn. 303, 130 A.2d 804 (1975), addressed a fact situation involving allegations of "collusion" between one party to an arbitration and the American Arbitration Association intended to deprive the other party of a fair, objective and neutral forum. The *Gaer* court set forth a rationale supporting a party's right to litigate overt pre-arbitration misconduct in court prior to an arbitration hearing or award:

> When there is no adequate remedy at law, the party claiming injury through partiality and fraud can invoke the equitable powers of a court for an appropriate remedy. The statutes relating to arbitration afford no remedy for partiality or collusion of the arbitrators until after an award has been made. . . . In their complaint, the plaintiffs alleged that unless the arbitration is stayed they will be required to submit to a prolonged, costly proceeding and that this unfair burden can readily be avoided upon proof, in this action, of bias and collusion. Fraud and partiality vitiate an award under our statutes as well as under the common law. . . . If courts can set aside an award for the partiality and collusion of arbitrators, they should have the power to interrupt proceedings when, in a plenary action *before* an award, one of the parties can prove partiality and collusion in the arbitration proceedings.

Id. at 807 (emphasis added). The *Metropolitan* court found "the simple logic behind the *Gaer* ruling compelling," *Metropolitan*, 780 F. Supp. at 896. The "simple logic" of the *Gaer* ruling is equally compelling when applied to the facts of this proceeding.

Finally, in *Bennish v. North Carolina Dance Theatre, Inc.*, 108 N.C. App. 42, 422 S.E. 2d 335 (N.C. Ct. App. 1992), the court collected and cited additional federal cases permitting a party to challenge overt pre-arbitration hearing misconduct prior to an arbitration award:

> We direct the substitution of a neutral arbitrator in the interest of judicial economy and to preserve the pur-

> poses of the Federal Abritration Act. A trial court's authority to appoint a neutral arbitrator is "inherent when the potential bias of a designated arbitrator would make aribtration proceedings [under the FAA] simply a prelude to later judicial proceedings challenging the arbitration award." *Masthead Mac Drilling Corp. v. Fleck*, 549 F.Supp. 854, 856 (S.D.N.Y. 1982) (citing *Erving*, 468 F.2d at 1067 & n. 2 (2d Cir. 1972); *see generally* Annotation, *Interest or Bias of Arbitrator*, 56 A.L.R.3d 697 (1974 & Supp. 1992). The court emphasized in *Erving*, 468 F.2d at 1067-68, that "the federal law is to be implemented in such a way as to make the arbitration effective and not to erect technical and unsubstantial barriers such as were the mode in the early days when arbitration was viewed by many courts with suspicion and hostility." *See Board of Education*, 303 N.C. at 415-18, 279 S.E.2d at 821-22 (favorably citing *Erving*).

Id. at 338. *Accord*, *Grane v. Grane*, 143 Ill. App. 3d 979, 493 N.E.2d 1112 (Ill. App. Ct. 1985); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716 (S.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); *Masthead Mac Drilling Corp. v. Fleck*, 549 F. Supp. 854, 856 (S.D.N.Y. 1982) (court has authority to appoint neutral arbitrator when potential bias of designated arbitrator would make arbitration proceeding "simply a prelude" to later judicial proceedings challenging the arbitration award); *Third National Bank v. Wedge Group, Inc.*, 749 F. Supp. 851 (M.D. Tenn. 1990). *See also* Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 28.3.3, at 28:47 (1995).

In this case, the trial court below should have exercised its "inherent authority" and addressed the merits of Caudle and Wright's complaint against Sears and the AAA. The overt arbitration misconduct alleged in Caudle and Wright's complaint—a conspiracy between Sears and the AAA committed with malice and in bad faith—is far more egregious misconduct than the misconduct criticized in the federal and state cases discussed above and found proper to litigate prior to any arbitration hearing or award—the potential bias of an arbitrator.

"The object of arbitration is to avoid the formalities, delay and expenses of litigation in [c]ourt." *See, e.g., Hough v. Osswald*, 198 Ill. App. 3d 1056, 556 N.E.2d 765, 766 (Ill.App. Ct. 1990). However, the misconduct of Sears and the AAA alleged in this case has had the opposite effect. Here, it is alleged that Sears and the AAA have conspired to make it financially impossible for Caudle and Wright to participate in their arbitrations. Tripling of the arbitration expenses as a result of Sears' insistence on and the AAA's appointment of three arbitrators and Sears' insistence on and the AAA's demand for pre-payment of all expenses is nothing more than an attempt to price Caudle and Wright out of a remedy. Also, Sears' insistence on and the AAA's allowance of communication with the arbitrators concerning non-payment of fees is an improper attempt to poison the arbitrators' neutrality in direct violation of the letter and spirit of the AAA rules. This attempt apparently has succeeded as evidenced by the AAA's adoption of Sears' proposal that Caudle and Wright's arbitrations be dismissed with prejudice, a remedy not even permitted by the AAA rules.

The scope of review under Section 10 of the FAA is "grudgingly narrow." *See, e.g., Eljer Manufacturing, Inc. v. Kowin Development Corp.*, 14 F.3d 1250, 1253 (7th Cir. 1994). In *Eljer*, the Seventh Circuit described the limited scope of review of an arbitration award: "Arbitration does not provide a system of 'junior varsity trial courts' offering the losing party complete and rigorous *de novo* review." *Id.* at 1254. Also, the Seventh Circuit pointed out in *Eljer* that plaintiffs will not receive a complete review of their allegations if they must await an award before being entitled to seek relief. *Id.*

In this case, if the lower court's ruling is not reversed, Caudle and Wright would be required to go through the entire arbitration process and then challenge the overt arbitration misconduct that tainted the process from the start. At the time such judicial review takes place, the arbitrators' award is generally regarded as substantially unreviewable. *See, e.g., Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969). This remedy is clearly inadequate because it would merely put the parties back at "square one" in a tainted proceeding after much needless expense of time and money by all parties to the arbitrations.

If Caudle and Wright are required to wait until an arbitration award has been rendered before appealing, the sole remedy to them on appeal is to start the process over. The *Metropolitan* court described this result as "senseless," *Metropolitan* 780 F.Supp. at 894, and it clearly is. The *Metropolitan* court and the other courts which have been confronted with this issue have all criticized this inadequate remedy as placing an unfair burden of additional time and expense on the parties given the allegations of overt arbitration misconduct at issue in each case. This unfair burden can only be avoided by permitting the state court below to address the merits of Caudle and Wright's complaint now rather than after an arbitration award has been rendered.

In addition, vacation of an arbitration award is an insufficient remedy for the overt arbitration misconduct alleged in Caudle and Wright's complaint against Sears and the AAA. Vacating the award for misconduct does not compensate Caudle and Wright for their lost time, wasted attorneys' fees, payments of fees to the offending arbitrators, and other consequential damages. *See, e.g., Grane v. Grane, supra.* Furthermore, Section 10 of the FAA does not even contemplate overt pre-arbitration hearing misconduct alleged against an arbitration institution such as the AAA. No remedy under Section 10 of the FAA will place Caudle and Wright in a different, unbiased arbitration forum administered by a neutral arbitration institution.

In summary, the "remedy" provided by Section 10 of the FAA is, in reality, no remedy at all in this case and underscores why Section 10 does not apply here. Section 10 would require Caudle and Wright to proceed through the arbitration process, have an award issued against them, have the award vacated by a federal district court, and then proceed back to arbitration before the AAA again (and possibly before the same three arbitrators) where they will be ordered to pay exorbitant deposits and have their complaints dismissed due to their financial inability to participate in the arbitration process, all *ad infinitum*. Such a result was never intended by Congress when it enacted Section 10 of the FAA.

CONCLUSION

On the basis of the arguments set forth and the authorities cited herein, petitioners Robert Caudle and Ronald Wright submit that a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

October 2, 1996

Mr. Rodney V. Taylor
Christopher & Taylor
1219 North Delaware St., P.O. Box 2850
Indianapolis, IN 46206

No. 81690—Robert Caudle et al., petitioners, v. Sears, Roebuck & Co., et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1996.

APPENDIX B

No. 5-95-0414

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Notice
The test of this order may be changed or corrected prior to the time for filing of a Petition for rehearing or the disposition of the same

ROBERT CAUDLE and RONALD WRIGHT,	) Appeal from the) Circuit Court of) Wayne County.
Plaintiffs-Appellees and Cross-Appellants,	)
and	)
DAVID ISAACSON,	)
Plaintiff,	)
v.	) No. 94-L-28
SEARS, ROEBUCK & CO.,	)
Defendant-Appellant and Cross-Appellee,	)
and	)
AMERICAN ARBITRATION ASSOCIATION, Defendant-Cross-Appellee.	) Honorable) Kathleen M. Alling, Judge, presiding.

RULE 23 ORDER

Robert Caudle and Ronald Wright appeal from the dismissal of their complaint, which alleges the fraud and conspiracy of Sears

and the American Arbitration Association (AAA) concerning alleged arbitration misconduct. The trial court dismissed plaintiffs' action with prejudice. The court also denied Sears' motion for sanctions. The plaintiffs and Sears appeal. We affirm.

This is the fourth appeal concerning matters arising out of the parties' business relationship. In the first appeal, the parties were ordered to arbitration. *Caudle v. Sears, Roebuck & Co.*, 245 Ill. App. 3d 959, 614 N.E.2d 1312 (1993) (*Caudle I*). On November 4, 1994, this court again entered a disposition, stemming from Sears' appeal of a temporary restraining order prohibiting Sears and the AAA from proceeding with arbitration. *Caudle v. Sears, Roebuck & Co.*, No. 5-94-0737 (Nov. 4, 1994) (unpublished order under Supreme Court Rule 23(c)(2) (134 Ill. 2d R. 23(c)(2)) (*Caudle II*). The temporary restraining order was dissolved, and the parties were again ordered to arbitrate. One week prior to the arbitration hearing, Robert and Joyce Caudle filed another suit against Sears and motion to stay arbitration based on information obtained during discovery leading up to the arbitration hearing. Sears filed a motion for sanctions, alleging that the plaintiffs were frivolously and vexatiously trying to avoid arbitration. This court affirmed the trial court's dismissal of plaintiffs' complaint and the trial court's denial of sanctions. *Caudle v. Sears, Roebuck & Co.*, Nos. 5-94-0484 & 5-94-0716 cons. (Feb. 22, 1996) (unpublished order under Supreme Court Rule 23) (*Caudle III*).

This fourth appeal concerns the dismissal of plaintiffs' complaint, which alleges that Sears and the AAA have conspired with each other to deprive plaintiffs of a fair, neutral, and objective forum, in that: (1) Sears and its subsidiaries are members of the AAA because they make payments to the AAA; (2) Sears insisted upon, and the AAA allowed, contrary to the AAA rules, the appointment of three arbitrators instead of one, thus financially prejudicing the plaintiffs; and (3) plaintiffs have been threatened with the dismissal of their claims with prejudice if they do not pay the arbitration fees and costs in advance, notwithstanding the AAA rules which allow for the deferral of AAA fees in cases of extreme hardship. The trial court dismissed the complaint on grounds that the Federal Arbitration Act (9 U.S.C.A. § 1 *et seq.* (West 1970 & Supp. 1996)) provides the exclusive remedy for challenging acts that taint an arbitration award. The court also ruled, "Although the wording of

plaintiffs' individual pending lawsuits may be worded differently, the parties are the same, the relief requested is the same (to avoid arbitration and allow a trial by jury) and the cause of actions bear substantial similarity to this action." Finally, the court found that Caudle could have raised one issue, regarding the fact that three arbitrators had been chosen instead of one, in his complaint that was the subject of the third appeal to this court.

Section 10 of the Federal Arbitration Act, to which the trial court refers (9 U.S.C.A. § 10 (West Supp. 1996)), provides the procedure for vacating an arbitration award where, among other reasons, the arbitrator has engaged in conduct similar to that alleged in plaintiffs' complaint. The trial court ruled that the plaintiffs' exclusive remedy for the allegations charged in their complaint, if available at all, is only available upon an appeal of the arbitration award. We agree that plaintiffs must await the final arbitration decision and appeal at that time.

In *Smith, Barney Harris Upham & Co. v. Robinson*, 12 F.3d 515 (5th Cir. 1994), the court held that the court cannot interfere with an arbitration proceeding if a valid arbitration agreement exists and the specific dispute falls within the substance and scope of that agreement; the court can only affect such proceedings by vacating, modifying, or correcting an award after it is rendered. The court's power to deal with the bias of the arbitrator is limited to setting aside the award after it has been rendered. *Petition of Dover Steamship Co.*, 143 F. Supp. 738 (S.D.N.T. 1956). Judicial review of an arbitrator's decision is intended to be more limited than appellate review of a trial court's decision. See *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 394, 574 N.E.2d 636, 644 (1991). We conclude that the trial court did not err in ruling that the plaintiffs' exclusive remedy is to await the final arbitration decision.

We now turn to Sears' argument that the trial court erred in denying Sears' motion for sanctions. The trial court's order provides:

> "The Court finds that Plaintiffs' attorneys made reasonable inquiry into the basis of the pleadings filed and cited case law that they relied upon to

> bring this cause of action; that while this Court ruled against Plaintiffs and dismissed their lawsuit in Caudle III, Defendants have not met their burden, in clearly proving for purposes of Rule 137 sanctions, that Plaintiffs were without legal foundation. The Court denies Defendants' Motion for Sanctions."

The decision on whether to impose sanctions rests within the sound discretion of the trial court, and the court's decision will not be reversed on appeal absent a clear abuse of that discretion. *Kennedy v. Miller*, 221 Ill. App. 3d 513, 582 N.E.2d 200 (1991); *Edward Yavitz Eye Center, Ltd. v. Allen*, 241 Ill. App. 3d 562, 608 N.E.2d 1235 (1993). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Fischer v. Brombolich*, 246 Ill. App. 3d 660, 616 N.E.2d 743 (1993).

Although we do not conclude that the trial court's denial of sanctions is erroneous, we are concerned by what appears to be repetitive maneuvers to avoid sending this matter to arbitration. On repeated occasions that plaintiffs have filed complaints on the eve of the arbitration setting and in each case have succeeded in delaying the arbitration process. If this should happen again, we would encourage the trial court to look very seriously at any sanction petition. We cannot find at this time that the trial court abused its discretion.

For the foregoing reasons, the decisions of the trial court dismissing plaintiffs' complaint and denying Sears' motion for sanctions are affirmed.

Affirmed.

CHAPMAN, J., with WELCH, J., and KUEHN, J., concurring.

APPENDIX C

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
WAYNE COUNTY, ILLINOIS

ROBERT L. CAUDLE, RONALD E. WRIGHT and DAVID ISAACSON	)
	)
Plaintiffs,	)
	)
vs.	)
	)
SEARS, ROEBUCK AND CO. and AMERICAN ARBITRATION ASSOCIATION	)
	)
Defendants.	)

O R D E R

This cause comes on for hearing on Defendant's Motion to Dismiss Complaint, Dissolve Temporary Restraining Order and Compel Arbitration. The T.R.O. has already been dissolved by the Fifth District Appellate Court on November 4, 1994. (No. 5-94-0737)

The Federal Arbitration Act (FAA) provides the exclusive remedy for challenging acts that taint an arbitration award. Since Plaintiffs are not challenging the arbitration agreement in this Complaint, the arbitration agreement is presumed valid, irrevocable and enforceable. No award has yet been made in this case but Plaintiffs have made allegations of wrongdoing, occurring during the arbitration process, that fall squarely with the scope of section 10 of the FAA. Plaintiffs must await the final arbitrators' decision and appeal these allegations of wrongdoing to the Federal District Court as directed by the rules of the FAA.

Plaintiffs have already raised these allegations of wrongdoing with the arbitrators as shown by their Exhibits C, F, G, H and K

to their Complaint. It is impermissible for Plaintiffs now to collaterally attack these adverse rulings, procedures or actions that have been made during arbitration. They must appeal by following the rules of the FAA.

The Illinois Code of Civil Procedure provides for involuntary dismissal where "there is another action pending between the same parties for the same cause" [735 ILCS 5/2-619(a)(3)] Although the wording of Plaintiffs' individual pending lawsuits[1] may be worded differently, the parties are the same,[2] the relief requested is the same (to avoid arbitration and allow a trial by jury) and the cause of actions bear substantial similarity to this action. Isaacson's and Wright's pending suits allege that since filing their demand for arbitration they have "discovered facts which render the arbitration provision unenforceable".[3] Caudle's Motion to Stay Judgment in *94-L-15*, his pending appeal,[4] raises the same issues he raises in this Complaint.

Caudle had the ability to bring to the Court's attention in *94-L-15* the fact that three (3) arbitrators had been chosen instead of one and the effect this had on his limited financial resources but chose not to include these allegations in that Complaint. This current lawsuit is an attempt to relitigate claims that have previously been raised or could have been raised and is barred by the prior adjudication of the Illinois Appellate Court in "Caudle I" and the Court's dismissal with prejudice in "Caudle II".

Without Caudle as a Plaintiff, Wright's and Isaacson's complaints must be dismissed because the Court lacks subject matter jurisdiction. [735 ILCS 5/2 619(a)(1)]

The Court further finds that there is no basis for Injunctive Relief because there is an adequate remedy at law and there has been

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[1] *Caudle* see Exhibit C to Sears' Reply Memorandum
Wright see Exhibit D to Sears' Reply Memorandum
Isaacson see Exhibit E to Sears' Reply Memorandum

[2] Except in Caudle's lawsuit as he did not previously name AAA as a Defendant.

[3] Paragraph 41 of Exhibit D and paragraph 31 of Exhibit E of Sears' Reply Memorandum.

[4] Exhibit C of Sears' Reply Memorandum

no showing that Plaintiffs have a reasonable likelihood of succeeding on the merits of their claims.

This Court adopts the arguments raised by Sears and AAA. For all of the foregoing reasons, this Court dismisses Plaintiffs' Complaint with prejudice.

/s/

JUDGE

[Dec. 6 1994]

APPENDIX D

SECTION 10 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 10

(a) In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

APPENDIX E

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
WAYNE COUNTY, ILLINOIS

ROBERT L. CAUDLE, RONALD E. WRIGHT, and DAVID ISAACSON, Plaintiffs, v. SEARS, ROEBUCK AND CO. and AMERICAN ARBITRATION ASSOCIATION, Defendants.	)	Cause No.

COMPLAINT

COUNT I

Now Come Plaintiffs, by counsel, and for their Complaint and say as follows:

1. Plaintiffs are Robert L. Caudle of Fairfield, Illinois, Ronald E. Wright of Macon, Missouri and David Isaacson of San Antonio, Texas.

2. Sears, Roebuck and Co. (hereinafter referred to as "Sears") is a corporation whose main place of business is in Cook County, Illinois, and for such reason is an Illinois resident.

3. The American Arbitration Association (hereinafter referred to as "AAA") is a voluntary unincorporated association do-

ing business in Illinois in that, inter alia, it maintains a regional office in Chicago, Cook County, Illinois.

4. Defendant Sears does business in Wayne County, Illinois, in that it sells and delivers merchandise to Wayne County on a regular and frequent basis.

5. Each Plaintiff herein was a catalog merchant owning and operating his own Sears catalog store.

6. Some part of the transactions hereinafter complained of took place in Wayne County, Illinois, in that Plaintiff Caudle executed a document containing the arbitration clause which Defendants have conspired together to use as a vehicle to defraud Plaintiffs as hereinafter described. Each Plaintiff was fraudulently induced to sign a document containing a similar provision. [Exhibit "A" sets forth the language of the arbitration clause]

7. By reason of this arbitration provision, Sears demands that each Plaintiff is required to submit his claims to arbitration pursuant to the rules of Defendant AAA.

8. At the insistence of Sears, each Plaintiff has demanded arbitration against Defendant Sears by reason of Sears terminating its catalog distribution system and, thereby, causing substantial monetary damages to each Plaintiff. When it was discovered that Sears fraudulently used the above-referred document, and specifically its arbitration provision to deprive them of their property, all Plaintiffs filed suit against Sears for that misconduct "*pre-arbitration misconduct*" which occurred prior to the misconduct complained of in this Complaint "*arbitration misconduct*". Robert L. Caudle filed a Complaint in Wayne County Circuit Court in Fairfield, Illinois alleging that Sears defrauded him regarding his investment in and the purchase of a catalog store. Ronald E. Wright and David Isaacson each filed Complaints in the Circuit Court of the City of St. Louis in St. Louis, Missouri alleging that Sears also defrauded them regarding their investment in and the purchase of catalog stores. All of the allegations in those actions involve only Sears *pre-arbitration mis-*

conduct. This Complaint alleges the fraud and conspiracy of Sears and AAA concerning their *arbitration misconduct*.

9. By accepting each Plaintiffs' demand for arbitration, Defendant AAA expressly and impliedly promised each Plaintiff that it would provide a fair, neutral and objective forum in which the arbitration process would be conducted in accordance with certain procedural rules, a copy of relevant portions of which are attached hereto, made a part hereof and labeled as Exhibit "B".

10. Based on information and belief, Defendant Sears and its subsidiaries are members of Defendant AAA and has obtained that status by making monetary payments to the AAA.

11. Defendant Sears has a regular and ongoing business relationship with Defendant AAA in that over the broad range of Sears' business activities, it regularly inserts arbitration clauses similar to Exhibit "A", all of which lead to a regular and substantial financial benefit to AAA.

12. Sears has specific knowledge that by reason of its termination of the catalog stores, each Plaintiff has extremely limited financial resources.

13. Defendant Sears and Defendant AAA have conspired and acted in complicity with each other, directly and indirectly, to deprive each Plaintiff herein of a fair, neutral and objective forum within which to fairly litigate his claims in that:

A. Rule 17 of the AAA rules provides that one (1) arbitrator shall be appointed, unless a different number is specified in the arbitration agreement. The arbitration clause of Exhibit "A" *does not* specify the number of arbitrators, nor has AAA revealed a basis for appointment of more than one (1) arbitrator. Over objection, as indicated in Exhibit "C", which is substantially identical to letters sent on behalf of Plaintiffs in each arbitration, and in violation of Rule 17, and at Sears' insistence, as shown on Exhibit "D", Defendant AAA appointed three arbitrators in each arbitration.

B. In each case, such appointments were made without explanation as to why three arbitrators were appointed and why three arbitrators were necessary or desirable under the provisions of Rule 17.

C. Sears, being fully aware of the financial hardship imposed upon Plaintiffs by its termination of the catalog stores, nevertheless insisted upon, and the AAA allowed, three arbitrators in order to increase the cost to Plaintiffs beyond that which they could reasonably pay.

D. The AAA, in submission of names of proposed arbitrators between each Plaintiff or those with claims identical to Plaintiffs, submitted names of individuals with previous professional associations with Sears or who refused to disclose whether they had any prior association with Sears. In each such instance, Plaintiffs, or others similarly situated, objected or, at a minimum, requested further information regarding said arbitrators. In each instance, the objected to and questioned arbitrators were appointed by AAA without reference to, ruling upon or response to Plaintiffs' questions or objections.

E. On or about June 15, 1994, counsel for Sears communicated with an officer of AAA regarding all Plaintiffs' cases by letter, Exhibit "E", seeking to have AAA exert financial pressure on Plaintiffs regarding payment of arbitration and other fees. Thereafter, and, upon information and belief, with the collusion of Sears by its counsel and representatives of AAA the following occurred:

i. Following correspondence from counsel for Sears, referred to above and contrary to rules of the AAA, each Plaintiff has been threatened with dismissal of his claims *with prejudice* unless such fees are paid by a date certain. Sears claims that the effect of any such dismissal with prejudice, would be to deny Plaintiffs any forum within which to litigate their claims against Sears.

ii. In each instance, both Sears and AAA are aware that each Plaintiff is under a severe financial hardship and lack of resources to pay such amounts.

F. Rule 47 of the AAA rules allows for deferral or reduction of AAA administrative fees in cases of extreme hardship. Rule 51 allows AAA to determine the amount and timing of deposits of funds for arbitrator compensation prior to commencement of arbitration. Plaintiffs, Caudle and Isaacson, submitted documentation of their severe financial and/or physical disability regarding such fees and deposits, a copy of which is attached hereto and labeled as Exhibits "F" & "G". Further, Caudle objected to the billing amount as shown in Exhibit "H". Further, another former Sears merchant, Forrest VanRiper, in his arbitration objected to the extreme inconsistency in the amount and method of calculating the deposit for arbitrators' fees, a copy of that objection is attached hereto as Exhibit "I". AAA never responded to the objection stated in Exhibits "H" and "I".

G. Defendants Sears and AAA acted in concert and in violation of the letter and spirit of Rule 50 in that each of them conspired to bring to the attention of the arbitrators the financial circumstances of Plaintiffs as shown in part by Exhibit "J". Plaintiffs objected to Defendants' bringing such matters to the attention of the arbitrators, which objection was ignored. (See Exhibit "K")

H. The AAA rules, on page 22 thereof, (See Exhibit "B") do not permit dismissal with prejudice for non-payment of fees, but permit only "suspension or termination" with no authority granted to make dismissal with prejudice.

14. All of the above acts engaged in by Defendants, Sears and AAA, were and are part of a conspiracy between them, in violation of express rules, to deny Plaintiffs a fair, objective and neutral forum governed by cognizable rules of procedure within which to resolve their various claims against Sears.

15. The actions of Defendants Sears and AAA as outlined herein are in bad faith, are willful, intentional and specifically designed and coordinated between them to violate Plaintiffs' rights to a fair forum within which to present their claims.

16. This count is brought pursuant to 735 ILCS § 5/1-701.

WHEREFORE, Plaintiffs and each of them pray that this Court enter a declaratory judgment that, based upon the arbitration misconduct alleged herein and the conspiracy of Defendants, that Defendant Sears and AAA have conspired to deny Plaintiffs a fair, objective and neutral forum within which to present their claims against Sears, and Plaintiffs are discharged from any obligation to arbitrate their claims against Sears regardless of outcome of any other pending litigation.

COUNT II

Now comes Plaintiff Robert L. Caudle by his attorneys, the LAW OFFICES OF MORRIS LANE HARVEY, the law firm of CHRISTOPHER & TAYLOR, and the law firm of LOWE, GRAY, STEELE & HOFFMAN, and for his second cause of action against Defendants, states:

1-15. Plaintiff repeats and realleges paragraphs 1 through 15 of Count I as paragraphs 1 through 15 of Count II.

16. By reason of the aforesaid, Plaintiff Robert L. Caudle has been damaged in one or more of the following ways.

A. Said Plaintiff has incurred fees and expenses to Defendant AAA as a part of the filing of his Demand for Arbitration and maintaining the arbitration action ordered in 92-L-15 in this Court to this point prior to discovery of Defendants' fraud and conspiracy.

B. By reason of the aforesaid, Plaintiff has incurred attorneys' fees and other expenses of litigation related to said arbitration, which by reason of the actions of Defendants, have been uselessly incurred.

17. The actions of both Defendants in this cause have been willful, intentional, oppressive and malicious to Plaintiff, and have been performed with the intent of depriving Plaintiff of his right to a fair and impartial forum in which to present his claims against

Sears. Such actions on the part of Defendants entitle Plaintiff to punitive damages.

WHEREFORE, Plaintiff Robert L. Caudle prays that judgment be entered for him and, jointly and severely, against Defendants for compensatory damages in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) and, further, prays that judgment be entered for him and against Defendant Sears, Roebuck and Co. for punitive damages in the amount of One Million Dollars ($1,000,000.00) and against Defendant American Arbitration Association for punitive damages in the amount of Five Hundred Thousand Dollars ($500,000.00).

COUNT III

Now comes Plaintiff Ronald E. Wright by his attorneys, the LAW OFFICES OF MORRIS LANE HARVEY, the law firm of CHRISTOPHER & TAYLOR, and the law firm of LOWE, GRAY, STEELE & HOFFMAN, and for his second cause of action against Defendants, states:

1-15. Plaintiff repeats and realleges paragraphs 1 through 15 of Count I as paragraphs 1 through 15 of Count III.

16. By reason of the aforesaid, Plaintiff Ronald E. Wright has been damaged in one or more of the following ways.

A. Said Plaintiff has incurred fees and expenses to Defendant AAA as a part of the filing of his Demand for Arbitration and maintaining the arbitration action ordered in 92-L-15 in this Court to this point prior to discovery of Defendants' fraud and conspiracy.

B. By reason of the aforesaid, Plaintiff has incurred attorneys' fees and other expenses of litigation related to said arbitration, which by reason of the actions of Defendants, have been uselessly incurred.

17. Plaintiff repeats and realleges paragraph 17 of Count II as paragraph 17 of Count III.

WHEREFORE, Plaintiff Ronald E. Wright prays that judgment be entered for him and, jointly and severely, against Defendants for compensatory damages in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) and, further, prays that judgment be entered for him and against Defendant Sears, Roebuck and Co. for punitive damages in the amount of One Million Dollars ($1,000,000.00) and against Defendant American Arbitration Association for punitive damages in the amount of Five Hundred Thousand Dollars ($500,000.00).

COUNT IV

Now comes Plaintiff David Isaacson by his attorneys, the LAW OFFICES OF MORRIS LANE HARVEY, the law firm of CHRISTOPHER & TAYLOR, and the law firm of LOWE, GRAY, STEELE & HOFFMAN, and for his second cause of action against Defendants, states:

1-15. Plaintiff repeats and realleges paragraphs 1 through 15 of Count I as paragraphs 1 through 15 of Count IV.

16. By reason of the aforesaid, Plaintiff David Isaacson has been damaged in one or more of the following ways.

A. Said Plaintiff has incurred fees and expenses to Defendant AAA as a part of the filing of his Demand for Arbitration and maintaining the arbitration action ordered in 92-L-15 in this Court to this point prior to discovery of Defendants' fraud and conspiracy.

B. By reason of the aforesaid, Plaintiff has incurred attorneys' fees and other expenses of litigation related to said arbitration, which by reason of the actions of Defendants, have been uselessly incurred.

17. Plaintiff repeats and realleges paragraph 17 of Count II as paragraph 17 of Count IV.

WHEREFORE, Plaintiff David Isaacson prays that judgment be entered for him and, jointly and severely, against Defendants for compensatory damages in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) and, further, prays that judgment be entered for him and against Defendant Sears, Roebuck and Co. for punitive damages in the amount of One Million Dollars ($1,000,000.00) and against Defendant American Arbitration Association for punitive damages in the amount of Five Hundred Thousand Dollars ($500,000.00).

On Behalf of Plaintiffs,
By One of Their Counsel,

/s/

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APPENDIX F

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT FROM THE
CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
WAYNE COUNTY, ILLINOIS

ROBERT L. CAUDLE,	)	
RONALD E. WRIGHT, and	)	
DAVID ISAACSON	)	
Plaintiffs-Appellants,	)	
v.	)	Cause No. 94-L-28
SEARS, ROEBUCK AND CO.	)	
and	)	
AMERICAN ARBITRATION ASSOCIATION,	)	
Defendants-Appellees.	)	
	)	
	)	
	)	
	)	

NOTICE OF APPEAL

ROBERT L. CAUDLE and RONALD E. WRIGHT, Plaintiffs-Appellants in the above entitled cause, by their attorneys, CHRISTOPHER & TAYLOR and THE LAW OFFICES OF MORRIS LANE HARVEY, appeal to the Appellate Court of Illinois, Fifth District, pursuant to Illinois Supreme Court Rule 303(a), from the ruling of Honorable Kathleen M. Alling by docket entry made on December 6, 1994. Said partial judgment, which dismissed Plaintiffs' Complaint with prejudice was finalized by the ruling of Honorable Kathleen M. Alling by docket entry made on May 22, 1995.

The basis for the errors claimed in the appeal is that the trial court erred in determining that the previous class action suit between Robert Caudle and others against Sears, Roebuck & Co., Cause No. 92-L-15, in the Circuit Court of Wayne County and the lawsuit filed by Robert L. Cause and Joyce Caudle against Defendant Sears, Roebuck & Co., Cause No. 94-L-15 in the Circuit Court

of Wayne County are *res judicata* with regard to issues raised in the Complaint in this cause.

Further, that the Court erred in determining that the Federal Arbitration Act provides Plaintiffs' sole remedy for the allegations of wrongdoing made in their Complaint, and therefore, Plaintiffs must await the final Arbitrators decision to appeal these allegations of wrongdoing to the Federal District Court.

Further, the trial court erred in finding that there is no basis for injunctive relief because Plaintiffs have an adequate remedy in law and there has been no showing that Plaintiffs have a reasonable likelihood of succeeding on the merits of their claims.

Finally, the trial court erred in dismissing Plaintiffs' claims pursuant to 735 ILCS 5/2-619(a)(3).

Robert L. Caudle and
Ronald E. Wright

BY: CHRISTOPHER & TAYLOR

BY: /s/
Rodney V. Taylor
One of the Attorneys for
Plaintiffs

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APPENDIX G

No. _____

IN THE
SUPREME COURT OF ILLINOIS

ROBERT CAUDLE AND RONALD WRIGHT,	)	Appeal from the
	)	Circuit Court of
	)	Wayne County,
Plaintiffs-Appellees and Cross-Appellants,	)	
	)	
	)	
and	)	
	)	
DAVID ISAACSON,	)	
Plaintiff,	)	
	)	
V.	)	No. 94-L-28
	)	No. 5-95-0414
SEARS, ROEBUCK & CO.,	)	
	)	
Defendant-Appellant and Cross-Appellee,	)	
	)	
	)	
and	)	
	)	
AMERICAN ARBITRATION ASSOCIATION,	)	Honorable
	)	Kathleen M. Alling,
	)	Judge, Presiding.
Defendant-Cross-Appellee.		

PLAINTIFFS-APPELLEES' PETITION FOR LEAVE TO APPEAL FROM THE APPELLATE COURT TO THE SUPREME COURT

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No. _____

IN THE
SUPREME COURT OF ILLINOIS

ROBERT CAUDLE AND RONALD WRIGHT,	) Appeal from the) Circuit Court of) Wayne County,
Plaintiffs-Appellees and Cross-Appellants,	)))
and	))
DAVID ISAACSON, Plaintiff,	)))
V.	) No. 94-L-28) No. 5-95-0414
SEARS, ROEBUCK & CO.,	))
Defendant-Appellant and Cross-Appellee,	)))
and	))
AMERICAN ARBITRATION ASSOCIATION,	) Honorable) Kathleen M. Alling,) Judge, Presiding.
Defendant-Cross-Appellee.	

PLAINTIFFS-APPELLEES' PETITION FOR LEAVE TO APPEAL FROM THE APPELLATE COURT TO THE SUPREME COURT

COME NOW Plaintiffs-Appellees and Cross-Appellants, Robert Caudle and Ronald Wright, by counsel, and, pursuant to Supreme Court Rule 315, petition the Supreme Court for leave to appeal to the Supreme Court from the "Rule 23 Order" entered by the Fifth District of the Appellate Court on July 26, 1996. In support of this Petition, Caudle and Wright state and allege the following:

1. This is a prayer for leave to appeal from the Appellate Court's "Rule 23 Order" brought before this Court pursuant to S.Ct. Rule 315.

2. The Appellate Court's "Rule 23 Order" was entered on July 26, 1996 (The Appellate Court's order is attached hereto, incorporated herein, and marked for reference as Exhibit A).

3. Caudle and Wright seek reversal of the Appellate Court's judgment based upon the following grounds: The Appellate Court erroneously concluded that Caudle and Wright's exclusive remedy for their allegations of arbitration misconduct are found in the Federal Arbitration Act (FAA); and require Caudle and Wright to await the final arbitration decision and appeal at that time.

4. This action was brought by Caudle and Wright seeking damages against Sears and AAA upon the allegation that Sears and AAA had conspired to create an arbitration forum within which Caudle and Wright could not fairly proceed.

Caudle and Wright alleged that Sears and AAA committed arbitration misconduct by: agreeing to the appointment of three arbitrators rather than one to artificially triple costs in violation of AAA rules; the refusal of the AAA to disclose whether the arbitrators selected had any prior association with Sears; the demand by AAA that fees and costs be paid in advance and ordering that the failure to do so would result in dismissal with prejudice, in violation of AAA rules; the refusal of AAA to defer administrative fees, as allowed by the AAA rules, based upon Caudle and Wright's showing of extreme financial hardship; and, the decision of Sears to bring the financial circumstances of Caudle and Wright before the arbitrators, in violation of AAA rules.

The Trial Court, upon Motion of Sears, dismissed each Count of the Complaint on the grounds of *res judicata*. The trial court also denied Sears' Motion for Sanctions (R. C-649).

5. Contrary to the Appellate Court's opinion, section 10 of the Federal Arbitration Act, 9 U.S.C.A. § 1 *et. seq.*, does not apply.

The FAA and its remedial component deal with appeals from an arbitration award. This case, on the other hand, concerns the propriety of the arbitration scheme employed by Sears. The language of section 10 only comes into effect at and after an arbitration award has been made. Neither the language of section 10, nor the cases that have construed it, deal with the facts alleged here: that the arbitrating body and one of the arbitrating parties have entered into a scheme to defraud the other arbitrating party of a fair and neutral forum.

The "remedy" provided by section 10 of the Federal Arbitration Act is, in reality, no remedy in this case and underscores why the Act does not apply. Section 10 would require Plaintiffs to proceed through the arbitration process, have an awarded issued against them, have that award vacated by a Federal District Court, and then proceed back to arbitration before AAA again and possibly before the same three arbitrators where they will be ordered to pay exorbitant deposits and dismissed due to their inability to do so *ad infinitum*.

Such an application of the FAA runs counter to the holdings of the United States Supreme Court. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968) the United States Supreme Court stated that in enacting Section 10(b) of the FAA it was not "the purpose of the Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."

WHEREFORE, for the foregoing reasons Plaintiffs-Appellees and Cross-Appellants, Robert Caudle and Ronald Wright, petition this Court for leave to appeal from the Appellate Court's "Rule 23 Order" of July 26, 1996 and pray that the circuit court of Wayne County's Order dismissing Plaintiffs' Complaint with prejudice and the findings therein be reversed and that this cause be remanded.

Respectfully Submitted,

/s/
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